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Reservations to Treaties

Note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations"

1. In his eleventh report on reservations to treaties, devoted to the formulation of objections, the Special Rapporteur proposed a draft directive 2.6.10 (Statement of reasons), which might read as follows:

> Whenever possible, an objection should indicate the reasons why it is being made.[1]

2. During the consideration of this draft directive at the current session, the Special Rapporteur, supported by several other members, noted with regret that he had not proposed a similar draft directive on the reasons for reservations. The need for such a directive was also mentioned at the meeting between members of the Commission and representatives of human rights bodies, held on 15 and 16 May 2007.

3. The Commission's work on the law of treaties and the 1969 and 1986 Vienna Conventions in no way stipulate that a State or international organization which formulates a reservation must give its reasons for doing so and explain why it purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects. Thus, giving reasons is not an additional condition for validity under the Vienna regime and it is not proposed that it should be made obligatory.

4. However, some conventional instruments require States to give reasons for their reservations and to explain why they are formulating them. A particularly clear example is article 57 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states:

> 1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular

[1] A/CN.4/574/para. 111.

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provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2. Any reservation made under this article shall contain a brief statement of the law concerned.

Under this regime, which is unquestionably lex specialis with respect to general international law, indication of the law on which the reservation is based is a genuine condition for the validity of any reservation to the European Convention. In its famous *Belilos* case, the European Court of Human Rights decided that article 57 (former art. 64), paragraph 2,

establishes not a purely formal requirement but a condition of substance.[2]

In the Court's view, the required reasons or explanations

provide a guarantee — in particular for the other Contracting Parties and the Convention institutions — that a reservation does not go beyond the provisions expressly excluded by the State concerned.[3]

The penalty for failure to meet this requirement to give reasons (or to explain) is the invalidity of the reservation.[4]

5. Under general international law, such a drastic consequence certainly does not follow automatically from a failure to give reasons, but the justification and usefulness of giving reasons for reservations, stressed by the European Court in 1988, are, generally speaking, applicable to treaties and reservations. Stating the reasons for a reservation is not an additional requirement that further limits States' and international organizations' ability to formulate reservations. It cannot be either the object or the purpose of a provision that encourages indication of the reasons for formulating a reservation. Such an indication gives the author of the reservation an opportunity not only to explain and clarify the reasons why the reservation was formulated — which may include (but not be limited to) impediments under domestic law that may make implementation of the provision on which the reservation is based difficult or impossible — but also to provide information that will be useful in assessing the validity of the reservation. In that regard, it should be borne in mind that the author of a reservation is also responsible for assessing its validity.

6. The reasons and explanations given by the author of a reservation also facilitate the work of the bodies with competence to assess the reservation's validity, including other contracting States or organizations, dispute settlement bodies responsible for interpreting or implementing the treaty and the treaty monitoring bodies.[5] Giving reasons for a reservation is, therefore, also one of the ways in which States and international organizations can cooperate with the other contracting

[2] *Belilos v. Switzerland* (application No. 10328/83), Judgement of 29 April 1988, *Reports of judgments and decisions of the European Court of Human Rights*, Series A, No. 132, para. 59.

[3] Ibid.

[4] Ibid., para. 60.

[5] See the tenth report on reservations to treaties (A/CN.4/558/Add.2, paras. 151-180) and, in particular, draft directive 3.2 (Competence to assess the validity of reservations).

parties and monitoring bodies so that the validity of the reservation can be assessed.[6]

7. Giving and explaining the reasons that, in the author's view, made it necessary to formulate the reservation also helps establish a fruitful reservations dialogue among the author of the reservation, the contracting States and international organizations and the monitoring body, if any. This benefits not only the States or international organizations which, under article 20 of the Vienna Conventions, are called upon to comment on the reservation by accepting or objecting to it, but also the author of the reservation, which, to the extent possible, can help allay any concerns that its partners may have regarding the validity of its reservation and steer the reservations dialogue towards greater mutual understanding.

8. Giving reasons (which, in any event, must be optional) is not an additional requirement that would make it more difficult to formulate reservations; it is a useful way for both the author of the reservation and the other concerned States, international organizations or monitoring bodies to fulfil their responsibilities effectively.

9. In practice, reasons are more likely to be given for reservations than for objections. States often formulate reservations without giving any reason for them. For example, Botswana simply appended the following reservation to its instrument of ratification of the Convention relating to the Status of Refugees, without explanation: s

> Subject to the reservation of articles 7, 17, 26, 31, 32 and 34 and paragraph 1 of article 12 of the Convention.[7]

The same is true of Bahrain's reservation to the Convention on the Elimination of All Forms of Discrimination against Women:

> ... the Kingdom of Bahrain makes reservations with respect to the following provisions of the Convention:
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> – Article 2, in order to ensure its implementation within the bounds of the provisions of the Islamic Shariah;
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> – Article 9, paragraph 2;
>
> – Article 15, paragraph 4;

[6] The Commission stressed this obligation to cooperate with monitoring bodies in its 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, paragraph 9 of which states: "The Commission calls upon States to cooperate with monitoring bodies ..." (*Yearbook* ... 1997, vol. II, Part Two, p. 58). This obligation to cooperate is explored at greater length in the tenth report of the Special Rapporteur (A/CN.4/558/Add.2, paras. 178-179) and is the subject of draft directive 3.2.3 (Cooperation of States and international organizations with monitoring bodies). It was also stressed by the international human rights treaty bodies in 2007 at their sixth inter-committee meeting (see the report of the meeting of the working group on reservations (HRI/MC/2007/5, para. 16 (Recommendations), recommendation No. 9 (a)).

[7] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005*, ST/LEG/SER.E/24, United Nations publication, New York, 2006, vol. I, chap. V, 2. See also Poland's reservation to the same Convention: "The Republic of Poland does not consider itself bound by the provisions of article 24, paragraph 2" (ibid., p. 392).

– Article 16, insofar as it is incompatible with the provisions of the Islamic Shariah;

– Article 29, paragraph 1.[8]

10. Nevertheless, this purely "descriptive" formulation of reservations is more rare than might be thought. States and international organizations often make a point of giving their reasons for formulating a particular reservation. In some cases, they do so purely for reasons of convenience, in which case their explanations are of no particular use in assessing the value of the reservation except perhaps insofar as they establish that it is motivated by such considerations of convenience.[9] But often, the explanations that accompany reservations shed considerable light on the reasons for their formulation. For example, Barbados justified its reservation to article 14 of the International Covenant on Civil and Political Rights by practical problems of implementation:

> The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d) of Article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present.[10]

In another example (among the many precedents), the Congo formulated a reservation to article 11 of the Covenant, accompanying it with a long explanation:

> The Government of the People's Republic of Congo declares that it does not consider itself bound by the provisions of article 11 [...]
>
> Article 11 of the International Covenant on Civil and Political Rights is quite incompatible with articles 386 et seq. of the Congolese Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1983. Under those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be enforced through imprisonment for debt when other means of enforcement have failed, when the amount due exceeds 20,000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith.[11]

11. Generally speaking, giving reasons is not a formal obligation on which the validity of the reservation depends. In practice, however, States frequently make a point of explaining the reasons for their reservations. For the aforementioned reasons, this practice should be encouraged.

12. Furthermore, although it seems wise to encourage the giving of reasons, this practice must not become a convenient smokescreen used to justify the formulation

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[8] Ibid., p. 251 (chap. IV, 8).

[9] This is true of France's reservation to the European Agreement supplementing the Convention on Road Signs and Signals: "With regard to article 23, paragraph 3 bis (b), of the Agreement on Road Signs and Signals, France intends to retain the possibility of using lights placed on the side opposite to the direction of traffic, so as to be in a position to convey meanings different from those conveyed by the lights placed on the side appropriate to the direction of traffic" (Ibid., p. 904 (chap. XI-B, 24)).

[10] Ibid., p. 180 (chap. IV, 4). See also the Gambia's reservation (ibid., p. 183).

[11] Ibid., p. 181 (chap. IV, 4).

of general or vague reservations. According to draft directive 3.1.7 (Vague, general reservations), adopted during the first part of the current session,

> A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty.

Giving reasons cannot obviate the need for the reservation to be formulated in terms that make it possible to assess its validity. Even without reasons, a reservation must be self-sufficient as a basis for assessment of its validity; the reasons can only facilitate this assessment.[12]

13. On the basis of these comments, the Commission will doubtless wish to adopt a draft directive recommending a statement of reasons for reservations. Logically, it should be included in the first section of part II of the Guide to Practice having to do with the form and formulation of reservations and might read:

> **2.1.9 Statement of reasons**
>
> Whenever possible, a reservation should indicate the reasons why it is being made.

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[12] Nevertheless, there are cases in which the clarification resulting from the reasons given for the reservation might make it possible to consider a "dubious" reservation to be valid. For example, Belize accompanied its reservation to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances with the following explanation:

> Article 8 of the Convention requires the parties to give consideration to the possibility of transferring to one another proceedings for criminal prosecution of certain offences where such transfer is considered to be in the interests of a proper administration of justice.
>
> The courts of Belize have no extra-territorial jurisdiction, with the result that they will have no jurisdiction to prosecute offences committed abroad unless such offences are committed partly within and partly without the jurisdiction, by a person who is within the jurisdiction. Moreover, under the Constitution of Belize, the control of public prosecutions is vested in the Director of Public Prosecutions, who is an independent functionary and not under Government control.
>
> Accordingly, Belize will be able to implement article 8 of the Convention only to a limited extent insofar as its Constitution and the law allows.

Without such an explanation, Belize's reservation might have been considered "vague or general" and might thus have fallen within the scope of draft directive 3.1.7. Accompanied by this explanation, it appears much more defensible.